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No. 79-1044

In the Supreme Court of the United States

OCTOBER TERM, 1979

WILLIAM C. BUSH, PETITIONER

v.

WILLIAM R. LUCAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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Washington, D.C. 20530

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 598 F. 2d 958. The opinions of the district court (Pet. App. B) and the Civil Service Commission (Pet. Apps. C & D) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 1979, and a petition for rehearing was denied on October 4, 1979. The petition for a writ of certiorari was filed on January 2, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a federal official is entitled to absolute immunity from damages liability under state tort law for statements made within the limits of his duties.

2. Whether the First Amendment gives rise to an implied cause of action for damages in circumstances in which there is an adequate federal statutory remedy.

STATEMENT

1. Petitioner is an aerospace engineer who for the last several years has worked for the National Aeronautics and Space Administration at the George C. Marshall Space Flight Center in Alabama. In the spring of 1975, following a reorganization of the civil service employees at the Center, petitioner made a number of well-publicized statements concerning his lack of meaningful work. Subsequently, in June 1975, respondent, who is the Director of the Center, presided over a press conference commemorating the 15th anniversary of the Center. At the conclusion of the press conference, respondent was questioned about petitioner's allegations. He replied that he had had petitioner's statements investigated and that they had no basis in fact (Pet. App. a1-6 to a1-7; b-2 to b-3).

In August 1975, a personnel action was initiated against petitioner to remove him from his position. Following a hearing, respondent notified petitioner that he had not been removed but that he had been reduced in grade from a GS-14 to a GS-12 position. Petitioner appealed this adverse action to the Civil Service Commission (Pet. App. a1-7 to a1-8; b-3 to b-4). The Regional Field Office initially rejected petitioner's claims (*id.* at c-1 to c-42), concluding that petitioner's public "statements were misleading; * * * generated an environment of sensationalism demeaning to the government, the agency, and its personnel at [the Center]; and * * * impeded government efficiency and economy and adversely affected public confidence in the government service" (*id.* at c-31). In July 1978, the Commission's

Appeals Review Board reconsidered and reversed the adverse personnel determination (Pet. App. d-1 to d-27). The Board found that although petitioner's comments were exaggerated, they were not motivated by malice and in fact "were not wholly without truth" (*id.* at d-17 to d-18, d-25). The Board further determined that petitioner's First Amendment interests outweighed the proven disruption to the agency's operation in this case (*id.* at d-25). Accordingly, the Board recommended that petitioner be reinstated to his former grade and position and be awarded $30,724.40 in back pay (*id.* at d-26).[1]

2. Prior to the Board's decision, petitioner filed this suit in state court, claiming that respondent's answer at the June 1975 press conference was defamatory and that respondent had conspired with others to demote petitioner, in violation of his First Amendment rights. After removing the case to the United States District Court for the Northern District of Alabama, respondent moved for summary judgment. In February 1977, the district court granted respondent's motion (Pet. App. b-1 to b-17). The district court held that under *Barr* v. *Matteo*, 360 U.S. 564 (1959), respondent was entitled to absolute immunity regarding petitioner's defamation claim (Pet. App. b-4 to b-11). The court further reasoned (*id.* at b-11 to b-16) that petitioner had not stated a constitutional cause of action for damages because of the availability of administrative review of the adverse personnel action and because of the "importance of the government's interests in promoting the efficiency and integrity of its public services through its employees" (*id.* at b-16).

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[1]NASA fully accepted this recommendation.

3. The court of appeals affirmed (Pet. App. a1-1 to a1-15). The court of appeals agreed with the district court that petitioner's defamation claim was foreclosed by *Barr* v. *Matteo*, *supra*, which held that a federal official is absolutely immune from damages liability under state tort law for statements made within the "outer perimeter of [his] line of duty." 360 U.S. at 575. The court of appeals rejected petitioner's contention that in light of *Butz* v. *Economou*, 438 U.S. 478 (1978), respondent was entitled only to a qualified immunity for his allegedly defamatory statements. The court explained that *Butz* was addressed to constitutional claims and that respondent's "statements to the press could not have violated [petitioner's] claimed First Amendment rights, even if the demotion may have" (Pet. App. a1-11).

Relying on *Davis* v. *Passman*, 422 U.S. 228 (1979), the court of appeals also concluded that the district court properly granted summary judgment regarding petitioner's constitutional damages claim. The court noted that the Civil Service statutes and regulations provide petitioner with an adequate remedy for his demotion and that, in fact, he had successfully pursued that remedy (Pet. App. a1-13 to a1-14). In the court of appeals' view, petitioner was therefore not entitled to pursue an additional constitutional remedy: "[W]e read *Passman* as not giving an optional remedy in addition to already sufficient remedies for wrongful action of a Government agent, but as an alternative when damage relief is needed" (*id.* at a1-13).

DISCUSSION

1. The courts below correctly concluded that respondent is entitled to absolute immunity with regard to

petitioner's defamation claims.[2] In *Barr* v. *Matteo*, *supra*, this Court held that a federal official may not be held liable in damages for defamatory statements made "within the outer perimeter of [his] line of duty," even if those statements were motivated by malice. 360 U.S. at 575.[3] To be sure, the Court subsequently concluded that in the context of constitutional damages actions federal officials such as respondent enjoy only a qualified immunity. *Butz* v. *Economou*, 438 U.S. 478 (1978). But the Court in *Butz* did not purport to alter the rule of absolute immunity recognized in *Barr* "with respect to state tort claims." 438 U.S. at 495. Moreover, every court of appeals that has considered this question has agreed that federal officials acting within the outer perimeter of their duty are absolutely immune from state tort law liability. See, *e.g.*, *Mir* v. *Fosburg*, No. 78-1103 (9th Cir. Jan. 22, 1980), slip op. 1709; *Tigue* v. *Swaim*, 585 F. 2d 909, 913 & n.6 (8th Cir. 1978); *Granger* v. *Marek*, 583 F. 2d 781, 784 (6th Cir. 1978); *Evans* v. *Wright*, 582 F. 2d 20, 21 (5th Cir. 1978); *Expeditions Unlimited Aquatic Enterprises, Inc.* v. *Smithsonian Institution*, 566 F. 2d 289 (D.C. Cir. 1977), cert. denied, 438 U.S. 915 (1978); and *Huntington Towers, Ltd.* v. *Franklin National Bank*, 559 F. 2d 863, 870 (2d Cir. 1977), cert. denied, 434 U.S. 1012 (1978).

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[2]Petitioner admits (Pet. 19) that the defamation counts on their face rely solely on state law (J.A. 19-21). His belated attempt to constitutionalize the tort claims are without merit. See *Paul* v. *Davis*, 424 U.S. 693 (1976).

[3]Both lower courts correctly held (Pet. App. a1-10; b-5 to 5-7) that respondent's statements were made within the scope of his duties as director of the Space Center. See *Barr* v. *Matteo*, *supra*, 360 U.S. at 574-575. Petitioner does not challenge that ruling here.

2. The courts below also properly granted summary judgment with regard to petitioner's constitutional damages action.[4] In *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), this Court held that at least in some circumstances a person aggrieved by unconstitutional federal action may bring suit based directly on the Constitution to recover damages for the injuries suffered. Both in *Bivens* and on several subsequent occasions, however, the Court has indicated that the existence of an alternative federal remedy counsels strongly against implication of a constitutional damages action. See, *e.g.*, *Davis* v. *Passman*, *supra*, 442 U.S. at 245, 247-248; *Butz* v. *Economou*, *supra*, 438 U.S. at 503; *Bivens* v. *Six Unknown Named Agents*, *supra*, 403 U.S. at 396-397. See also *Butz* v. *Economou*, *supra*, 438 U.S. at 524-525 (Rehnquist, J., dissenting); *Monell* v. *New York City Department of Social Services*, 436 U.S. 658, 712-713 (1978) (Powell, J., concurring). Because Congress has provided a comprehensive administrative remedy for federal employees, such as petitioner, who have been improperly demoted,[5] there is no justification for creating a redundant damages remedy, based directly on the Constitution, in the circumstances of this case. Accord, *Turpin* v. *Mailet*, 591 F. 2d 426 (2d Cir. 1979) (en banc); *Molina* v. *Richardson*, 578 F. 2d 846, 850-853 (9th Cir. 1978); *Richardson* v. *Wiley*, 569 F. 2d

[4]Petitioner alleged that respondent and others conspired to demote him because of his statements, thereby depriving him of his First Amendment rights (J.A. 21-23).

[5]See 5 U.S.C. 7511 *et seq.*; 5 U.S.C. 5596; 5 C.F.R. Part 752, Subparts C and D, Parts 754 and 772 (1977). Subsequent to the filing of the suit in this case, Congress amended the Civil Service provisions. See Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1135-1144. Those amendments do not affect the merits of this case.

140 (D.C. Cir. 1977); *Mahone* v. *Waddle*, 564 F. 2d 1018, 1024-1025 (3d Cir. 1977). See also *Brown* v. *General Services Administration*, 425 U.S. 820 (1976).[6]

As petitioner notes (Pet. 21-22), there is some disagreement among the courts of appeals concerning the applicability of *Bivens* to constitutional torts for which there is a federal statutory remedy. Compare *Hernandez* v. *Lattimore*, No. 78-2098 (2d Cir. Dec. 6, 1979), petition for rehearing pending, and *Fitzgerald* v. *Seamans*, 553 F. 2d 220, 226-227 (D.C. Cir. 1977), with the cases cited in the preceding paragraph. This issue is currently before the Court in *Carlson* v. *Green*, No. 78-1261 (argued Jan. 7, 1980).[7] Accordingly, we suggest that the Court holds this case pending the disposition in *Carlson*. See also *Moffitt* v. *Loe*, petition for cert pending, No. 78-1260.

[6]Indeed, in light of the substantial award of back pay that petitioner has already received, petitioner's reinstatement, and the Civil Service Commission's declaration that petitioner's demotion violated the First Amendment, it is not apparent what further relief petitioner could obtain, even if he were permitted to pursue his constitutional cause of action. Cf. *Bivens* v. *Six Unknown Named Agents*, *supra*, 403 U.S. at 406-409 (Harlan, J., concurring); *Givhan* v. *Western Line Consol. School Dist.*, 439 U.S. 410, 413 (1979); *Mt. Healthy City Board of Ed.* v. *Doyle*, 429 U.S. 274, 277 (1977). We further note that respondent is in any event entitled to assert a qualified immunity as a defense to petitioner's claim for damages. See *Butz* v. *Economou*, *supra*, 438 U.S. at 507-508 & n.35.

[7]Although *Carlson* involves the Federal Tort Claims Act and not a Civil Service remedy, the Court's decision in *Carlson* may bear directly on the precise question posed by this case. We have sent a copy of our brief in *Carlson* to petitioner.

CONCLUSION

The petition for a writ of certiorari, limited to questions one and two, should be disposed of as appropriate in light of *Carlson* v. *Green*, No. 78-1261. In all other respects, the petition should be denied.

Respectfully submitted.

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Solicitor General

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